UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP No. PR 98-090

IN RE: FELIX A. RODRIGUEZ MOLINARY and GEORGINA TORRENTS RAMOS,
Debtors.

FELIX A. RODRIGUEZ MOLINARY and GEORGINA TORRENTS RAMOS,
Appellants,

v.

GORBEA & CAMACHO and JAN P. JOHNSON, CHAPTER 13 TRUSTEE,
Appellees.

Appeal from the United States Bankruptcy Court for the District of Puerto Rico
(Hon. Enrique S. Lamoutte, U.S. Bankruptcy Judge)

Before
Queenan, Hillman and Feeney, U.S. Bankruptcy Judges

José Ramón Cintrón, Esq. for the Appellants.

Herman F. Valentin Figueroa, for the Appellee Gorbea & Camacho.

July 8, 1999

Per Curiam

INTRODUCTION

This appeal concerns the granting of a motion to dismiss the Chapter 13 case of Felix Rodriguez Molinary and Georgina Torrents Ramos (the "Debtors") and the denial of a motion to reconsider the same. Although we find no fault with the granting of the motion to dismiss, we cannot properly assess the propriety of the denial of the reconsideration motion and we will remand this matter for further findings of fact and conclusions of law consistent with this decision.

FACTUAL AND PROCEDURAL BACKGROUND

The Debtors filed their voluntary petition under Chapter 13 on May 20, 1996. In Schedule A, Real Property, they listed two properties located in Ponce, Puerto Rico. They claimed the first property, their principal residence, had a value of $90,000 subject to a secured claim of $85,000. They valued the second property, their business premises, at $75,000 subject to a secured claim of $74,000.

In Schedule D, Creditors Holding Secured Claims, the Debtors listed four creditors: (1) P.R. Home Mortgage holding a first mortgage of $40,000 on the principal residence;[1] (2) Banco Financiero de P.R. holding a first mortgage of $59,000 on the business premises;[2] (3) Miguel A. Mendez holding a second mortgage of $20,000 on the personal residence; and (4) P.R. Department of the Treasury ("Hacienda") holding a tax lien on the personal residence. The Debtors listed the latter two as disputed. The Debtors did not list

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[1]P.R. Home Mortgage filed a proof of claim in the amount of $53,210.

[2] Banco Financiero filed a proof of claim for $76,339. Banco Financiero subsequently assigned its claim to Gorbea & Camacho ("G&C").

any creditors in Schedules E and F. In Schedules I and J, the Debtors reported a total combined monthly income of $4,750 and total monthly expenses of $3,755.

In their Chapter 13 plan (the "Plan") dated May 16, 1996, the Debtors stated that they would make monthly payments to the Chapter 13 trustee (the "Trustee") in the amount of $600. The Plan provided that from that amount the Trustee would pay the administrative claims and apply the remainder to satisfy the arrearage claims which P.R. Home Mortgage and Banco Financiero held. The Plan also provided for monthly mortgage payments to be made directly to these creditors. The Debtors explained that they would satisfy the Mendez claim with a balloon payment after the bankruptcy court determined the amount of his claim. Lastly, the Plan specifically made no provision for the Hacienda claim on the ground that it was a disputed claim.

On October 28, 1996 the Debtors filed an amended plan (the "Amended Plan"), dated October 8, 1996, which provided that the Debtors would sell the business premises for $130,000, free and clear of liens, upon confirmation of the Amended Plan and apply the proceeds to satisfy in full the claims of Banco Financiero and P.R. Home Mortgage. The Amended Plan contained provisions similar to the provisions of the Plan with respect to the other two claimants. After filing the Amended Plan, the Debtors continued to make the $600 monthly payments to the Trustee as provided in the Plan.

On November 13, 1996, the Debtors filed their "Objection to Claim Creditor Miguel A. Mendez." The Debtors argued the Mendez mortgage was void under the P.R. Civil Code so that they were entitled to an order disallowing the claim and discharging the lien. The bankruptcy court held a pre-trial hearing on the objection and thereafter the parties filed cross motions for summary judgment. Also on November 13, 1996 the Debtors filed

an objection to the Hacienda claim.[3]

On December 2, 1996, the Trustee issued a report in which he stated that he could not recommend confirmation of the Amended Plan. On December 10, 1996, the bankruptcy court held a hearing on confirmation. The bankruptcy court rescheduled the hearing "without a date, pending objections to claims."

On September 25, 1997, the bankruptcy court entered an order dismissing the objection to the Hacienda claim. On October 6, 1997, the Debtors filed an emergency motion to reconsider the order. On October 16, 1997, the bankruptcy court ordered the Debtors to provide further information to enable it properly to rule on the motion for reconsideration. The Debtors responded to that order within two weeks.

On January 15, 1998, the Debtors filed a "Motion Requesting Order" in which they requested that the bankruptcy court rule on their pending objections to claims.

On March 5, 1998, the Trustee and G&C filed their "Joint Motion Requesting Dismissal" (the "Dismissal Motion"). The motion outlined numerous grounds for the dismissal, including several alleged deficiencies in the Amended Plan and the Debtors' delay in obtaining confirmation of the Amended Plan.[4] The notice on the motion requested the filing of a response within twenty days.

On April 2, 1998, Debtors moved for an extension of time, until May 30, 1998, to respond to the Dismissal Motion contending that "due to an overload of tax compliance

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[3]On the same date, the Debtors filed an objection to the claim of the Internal Revenue Service. The record reflects that the Debtors settled that claim.

[4]One subparagraph describes how the Amended Plan is insufficiently funded. The subparagraph ends with the sentence, "Also note that the alleged sales price is almost twice the value of the property included in Schedule A." Dismissal Motion, ¶ 5(a).

work caused by the 1997 tax season, the undersigned counsel has been unable to timely finalize Debtors' reply to the referenced Joint Motion" (the "Extension Motion"). On April 14, 1998, G&C objected to the Extension Motion. On April 21, 1998, the bankruptcy court denied the Extension Motion. The docket reflects that the case was dismissed on April 24, 1998, which happened to be when the Debtors filed their opposition to the Dismissal Motion. As the bankruptcy judge noted at the hearing described below, there is no document to support that docket entry, other than an endorsement order on the Dismissal Motion noting that it was granted on April 21, 1998. It would appear that no notice was given of the dismissal, for on May 5, 1998, G&C moved for the entry of a dismissal order.[5]

On May 8, 1998, the Debtors filed "Debtors' Motion to Reconsider Order Dismissing Case" (the "Reconsideration Motion"). The bankruptcy court scheduled a hearing for August 6, 1998 to consider the Debtors' opposition to the Dismissal Motion *and* the Reconsideration Motion. Both motions are included in the docket reference for the hearing notice and in the hearing notice itself. The transcript of the hearing, however, reflects that at the hearing on August 6, 1998, the bankruptcy judge considered only the Reconsideration Motion to be before him.[6]

At the hearing, the bankruptcy judge incorporated the objection to dismissal into the Motion for Reconsideration. Taking the two documents together, the Debtors argued that the dismissal was unwarranted because the delay in the case was due to a lack of a decision on their objections to claims. With respect to the objections to the Amended Plan,

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[5] The docket reflects that no action was taken on this motion.

[6] *Transcript* pp. 2-4. The bankruptcy judge acknowledged that he had been unaware of the Debtor's objection at the time he dismissed the case and the objection had merit.

the Debtors stated that they were inappropriate given that their creditors would be paid 100%. The Debtors also argued that it was premature to analyze the Amended Plan because they were entitled to remedy any of its defects after the bankruptcy court decided the claims issues. They said they were making monthly payments to the Chapter 13 trustee and that they were making monthly payments to secured creditors. Accordingly, the Debtors contended there was no cause to dismiss the Chapter 13 case.

The Trustee and G&C reiterated their arguments with respect to why dismissal was appropriate. G&C further added that dismissal was appropriate given the Debtors' delay in responding to the Dismissal Motion.

The bankruptcy judge inquired of the Debtors whether the business property was ready to be sold. The Debtors replied that they had a willing buyer. The Debtors further added that they were pursuing a second option which was to refinance the business property and develop it themselves, failing this they would resort to the sale.

After considering the arguments of the parties, the bankruptcy court entered the following order:

> It appears from the proffers made at the hearing that debtor's plan is now different from the one he filed in 1996 with the petition. The foreclosure of the business property has been stayed by the filing of the petition. Debtor now intends to retain the property and develop it. Debtor is in arrears with the trustee.
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> The Court finds that the debtor has understated the value of the property for approximately fifty percent, has not amended the schedules to list the market value of the property, and now intends to keep the property and develop it. These are the same grounds that led to the dismissal of the case. The Court finds that these facts constitute cause to dismiss the case pursuant to 11 U.S.C. §1307(c). Thus, the motion for reconsideration of dismissal is hereby denied. The dismissal

stands but without any bar to refiling.

On August 14, 1998, the Debtors filed a Notice of Appeal. The only order referenced in the Notice of Appeal is the order of August 6, 1998 denying the Reconsideration Motion. In their Statement of Issues, the Debtors argue that the bankruptcy court erred in denying the motion and dismissing the Chapter 13 case. In their "Additional Statement of Issues and Designation of Additional Items to be Included on Appeal", G&C questions "[w]hether or not the Bankruptcy Court has the discretion to dismiss and/or deny a request for reconsideration of an order for dismissal based upon debtors' own admissions and representations during the hearing scheduled to reconsider the order of dismissal."[7]

In their brief, the Debtors state that the legal issue in this appeal is whether the bankruptcy court erred in dismissing their case. Appellants' Brief, p. 1. In the next sentence, the Debtors explain that they are appealing from the order dated August 6, 1998, denying the Reconsideration Motion. In its brief, G&C repeats the statement of issues found in their Additional Statement. In addition, in the "Standard of Review" section, G&C argue that an abuse of discretion standard should be applied and that the bankruptcy court "did not abuse its discretion by dismissing the case based upon the debtors' conduct and admissions." Appellees Brief, p.1.

At the argument on appeal, counsel to the Debtors stated that they are appealing the order dismissing the Debtors' chapter 13 case. After addressing a preliminary matter, counsel for G&C started his argument by referencing the order dismissing the underlying

[7]The appellees do not address this issue in their brief.

case.

JURISDICTION

The dismissal of Debtors' Chapter 13 case and the denial of their motion for reconsideration are final judgments, providing us with jurisdiction pursuant to 28 U.S.C. §§ 158(a) and (b).[8] The first question in this appeal, however, is whether one or both of these orders is before us.

The notice of appeal specified that the appeal was only from the Reconsideration Motion. The subsequent pleadings and the oral argument before this Court addressed the propriety both of dismissing the Chapter 13 case and denying the motion to reconsider that order. G&C never argued that the appeal was restricted to the order denying the Reconsideration Motion.

Fed. R. Bankr. P. 8001(a) requires that the notice of appeal follow the appropriate Official Form. Official Form 17 requires a specification of the "judgment, order, or decree" appealed from. Rule 8001(a) is parallel to Fed. R. App. P. 3(c) which has similar requirements for the content of a notice of appeal.

The First Circuit has addressed the issue of whether the appeal of a denial of a motion for reconsideration confers jurisdiction upon the appellate court to consider the denial of the underlying motion. *See American Int'l Ins. Co. v. American Nat'l Fire Ins. Co.,* 45 F.3d 564, 567 (1st Cir. 1995) ("mistake in designating a judgment in the notice of appeal

[8]The Federal Rules of Bankruptcy Procedure do not provide for a "Motion for Reconsideration." *In re Wedgestone Financial*, 152 B.R. 786, 788 (Bankr. D. Mass. 1993). Courts have treated a motion which is filed within 10 days, such as the Reconsideration Motion, as a motion brought under Fed. R. Bankr. P. 9023 which adopts Fed. R. Civ. P. 59. *Id.*

will not ordinarily result in a loss of the appeal 'as long as the intent to appeal from a specific judgment can be fairly inferred from the notice, and the appellee is not misled by the mistake.'") (citation omitted); *LeBlanc v. Great American Ins. Co*, 6 F3d 836 (1st Cir. 1993) (same); *Kotler v. American Tobacco Co,.* 981 F.2d 7, 11 (1st Cir. 1992) ("[W]e do not examine the notice in a vacuum but in the context of the record as a whole.")

In *LeBlanc*, the defendant prevailed on a motion for summary judgment. The plaintiff filed a motion for reconsideration and notice of appeal. The appeal was dismissed because the motion for reconsideration had not been acted upon. After the denial of the motion for reconsideration, the plaintiff filed a notice of appeal of the order denying reconsideration of the underlying motion. The appellee argued that the court had jurisdiction to consider only the order denying reconsideration. The court disagreed as follows:

> It is true that Fed. R. App. P. 3(c) states that "[t]he notice of appeal shall specify the . . . order or part thereof appealed from." Rule 3(c)'s "commands are jurisdictional and mandatory. . . . Nevertheless, courts have been admonished to interpret Rule 3(c) liberally.
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> In general, "an appeal from the denial of a Rule 59(e) motion is not an appeal from the underlying judgment." . . . Yet this rule is not inflexible. This circuit has allowed a timely appeal from the denial of a timely Rule 59(e) motion to serve as notice of an appeal from the underlying judgment in cases where the appellant's intent to appeal from the judgment is clear. . . . In making this assessment, we consider the notice of appeal "in the context of the record as a whole."

LeBlanc, 6 F.3d 836, 839 (1st Cir. 1993) (citations omitted).[9]

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[9]Regarding a case with facts similar to those in *LeBlanc*, the Supreme Court stated that "[t]aking the two notices and the appeal papers together, petitioner's intention to seek review of both the dismissal and the denial of the [underlying] motions was manifest."

In this case, the notice of appeal only referenced the denial of the Reconsideration Motion. The pleadings, although inartful, addressed both motions as did the oral argument. The appellees never attempted to restrict our jurisdiction to the Reconsideration Motion and in fact addressed the Dismissal Motion at oral argument. The record as a whole shows that there was ample notice that the Debtors were appealing the Dismissal Motion as well as the Reconsideration Motion. G&C has treated both motions as subject to appeal. We therefore conclude that we have jurisdiction to consider both motions.

STANDARD OF REVIEW

With respect to the Dismissal Motion, our review requires that the bankruptcy court's decision be overturned only if the Debtors establish that the bankruptcy court committed a clear abuse of discretion. *Roumeliotis v. Popa (In re Popa)*, 214 B.R. 416, 418 (1st Cir. B.A.P. 1997), and cases cited, *aff'd without reference to this point*, 140 F.3d 317 (1st Cir.), *cert. denied*, 119 S.Ct. 163 (1998). "An abuse of discretion occurs when a relevant factor deserving of significant weight is overlooked, or when an improper factor is accorded significant weight, or when the court considers the appropriate mix of factors, but commits a palpable error of judgment in calibrating the decisional scales." *U.S. v. Roberts*, 978 F.2d 17, 21 (1st Cir. 1992). A trial court's refusal to grant relief on reconsideration is reviewed by the same standard. *United States v. Roberts*, 978 F.2d 17, 20 (1st Cir. 1992).

DISCUSSION

We will first address the order dismissing the Chapter 13 case. 11 U.S.C. §1307 contains the provision for dismissal of a Chapter 13 case. It provides as follows:

Foman v. Davis, 371 U.S. 178, 181 (1962).

> (c) Except as provided in subsection (e) of this section, on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including—
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> (1) unreasonable delay by the debtor that is prejudicial to creditors;
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> (2) nonpayment of any fees and charges required under chapter 123 of title 28;
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> (3) failure to file a plan timely under section 1321 of this title;
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> (4) failure to commence making timely payments under section 1326 of this title;
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> (5) denial of confirmation of a plan under section 1325 of this title and denial of a request made for additional time for filing another plan or a modification of a plan;
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> (6) material default by the debtor with respect to a term of a confirmed plan;
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> (7) revocation of the order of confirmation under section 1330 of this title, and denial of confirmation of a modified plan under section 1329 of this title;
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> (8) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan other than completion of payments under the plan;
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> (9) only on request of the United States trustee, failure of the debtor to file, within fifteen days, or such additional time as the court may allow, after the filing of the petition commencing such case, the information required by paragraph (1) of section 521; or
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> (10) only on request of the United States trustee, failure to timely file the information required by paragraph (2) of section 521.

In the Dismissal Motion, G&C presented a number of grounds to support its request for dismissal. They contend that the Amended Plan was incapable of confirmation and that the dismissal was proper in light of the Debtors failure to submit monthly operating reports and delay in prosecuting their Chapter 13 case.

According to the Dismissal Motion, any opposition was due to be filed by March 25,

1998. In was not until April 4, 1998 that the Debtors asked for an extension of the time within which to respond. The bankruptcy court denied the Extension Motion on April 21, 1998. The Debtors then filed an opposition on the same date that the bankruptcy court dismissed the case, April 24, 1998.

Because there was no hearing on the Dismissal Motion, we will presume that the bankruptcy judge granted the Dismissal Motion based upon the unopposed representations contained therein. The Debtors' untimely request to extend the objection deadline and their untimely objection warranted the bankruptcy judge relying on the allegations contained in the Dismissal Motion. The bankruptcy judge therefore did not abuse his discretion in granting the Dismissal Motion, so we affirm the order granting the motion.

We next turn to the propriety of the denial of the Reconsideration Motion. At the hearing on that motion, the bankruptcy judge stated that he would incorporate the Debtors' grounds for the opposition to dismissal into the Reconsideration Motion.

With respect to the standard for considering a Rule 59(e) motion, the First Circuit has stated:

> Rule 59(e) motions are "aimed at reconsideration, not initial consideration." . . . Thus, parties should not use them to "raise arguments which could, and should, have been made before judgment issued." . . . Motions under Rule 59(e) must either clearly establish a manifest error of law or must present newly discovered evidence. . . . They may not be used to argue a new legal theory.

Federal Deposit Insurance Corporation v. World University Inc., 978 F.2d 10 (1st Cir. 1992); *See also Ayabar v. Crispin-Reyes*, 118 F.3d 10, 16 (1st Cir. 1997) ("The rule does not provide a vehicle for a party to undo its own procedural failures, and it certainly does not allow a party to introduce new evidence or advance arguments that could and should

have been presented to the district court prior to the judgment."); *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88, 90 (1st Cir. 1993) ("Rule 59(e) motions are granted for reasons such as the commission by the trial court of a manifest error of law or fact, the discovery of new evidence, or an intervening change in the law.").

The bankruptcy judge's grant of the unopposed Dismissal Motion was presumably based upon the ample cause which was alleged in the motion. In their objection and Reconsideration Motion, the Debtors pointed to several errors of fact which, if established, would have negated the proffered cause set forth in the Dismissal Motion.[10]

At the hearing on the Reconsideration Motion, the bankruptcy judge stated that he granted the Dismissal Motion because (1) the Debtors understated the value of business property and failed to amend their schedules to reflect the same; and (2) the Debtors had announced they would like to refinance and retain their business property. The bankruptcy judge then stated that because these same grounds continued to exist, he would deny the Reconsideration Motion.

This Court has difficulty assessing the August 6, 1998 order in terms of whether the bankruptcy judge properly applied the test for reconsideration. That is, the first reason for dismissal, the improperly scheduled value for the business premises, was not directly raised in the Dismissal Motion. It was alluded to in a subparagraph in which the movants focused upon the funding for the Amended Plan. Although the matter was discussed at the August 6 hearing, it was not a matter to which counsel for the Debtors could respond because he clearly did not understand it to be the focus of the dispute.

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[10]By incorporating the objection to the Dismissal Motion in the Reconsideration Motion, the bankruptcy court was treating the issues raised therein as newly raised.

With respect to the second reason for the granting of the Dismissal Motion, an alternative plan, it was not a proper reason for granting the Dismissal Motion because the Debtors desire to retain the business property was not addressed in the Dismissal Motion. Moreover, as the Debtors explained, the issue of plan confirmation was premature because the bankruptcy court had delayed confirmation pending a resolution of the claims objections. In fact, it appears that instead of applying the standards for reconsideration, the bankruptcy court determined that additional grounds existed for granting the dismissal motion notwithstanding whatever newly discovered facts or errors of law the Debtors were trying to establish.

Based upon the record, this Court cannot adequately determine the grounds upon which the bankruptcy court denied the Reconsideration Motion. That is, we are unable to determine whether the bankruptcy court found the motion to be lacking because the Debtors failed to establish an error of law or present newly discovered evidence. If the bankruptcy court denied the Reconsideration Motion because it found new grounds to warrant dismissal, this was in error because the Debtors were afforded insufficient notice to address these grounds. Accordingly, we remand this case for further findings of facts and conclusions of law to assist us in determining the propriety of the denial of the Reconsideration Motion based upon the standards set forth in this decision.